Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 21-30-1986
VINCENT NG J
25 JULY 1996

Evidence *— 'Without prejudice' communications — Admissibility — Evidence of 'without prejudice' negotiations — Whether privilege absolute — Document prepared by party not intended to be sued — Whether privilege applies — Evidence Act 1950 s 23*

Civil Procedure *— Amendment — Parties — Name of defendant — Correction of — Effect of amendment — Rules of the High Court 1980 O 20 r 5(3)*

On 31 March 1986, the plaintiff brought an action against Suruhanjaya Pelabuhan Pulau Pinang ('SPPP') who was named as the first defendant. SPPP was the first defendant in the suit until 26 September 1995 wherein, upon the plaintiff's application, they were substituted to read as 'Penang Port Sdn Bhd (formerly known as Suruhanjaya Pelabuhan Pulau Pinang)' ('PPSB'). In a letter dated 16 May 1995, which contained the words 'without prejudice' ('exh RA'), PPSB had admitted liability to the plaintiff on the claim. Subsequently, the plaintiff obtained a copy of the Suruhanjaya Pelabuhan Pulau Pinang Annual Report 1994 and discovered that SPPP was still in existence and that it had assumed the role of owner regulator as opposed to that of owner operator. The plaintiff applied, inter alia, for an order that SPPP be reinstated as the first defendant in the statement of claim. Counsel for SPPP objected to this application on the grounds that: (a) the limitation period had already set in; and (b) the amendment, if allowed, would amount to adding a new party rather than merely changing a name. PPSB objected to the use of exh RA for the purposes of this application.

Held, allowing the application:

(1) The rule of privilege which applies to communications in the course of settlement negotiations is not absolute despite s 23 of the Evidence Act 1950 (see p 516F).

(2) In this case exh RA could be admitted for the purpose of this application as there was no evidence that the said exhibit was written in the course of serious negotiations or towards a settlement of a dispute. Exhibit RA was written by PPSB and not by SPPP which the plaintiff intended to sue. Furthermore, proof of the exhibit was vital in order to establish the factual cause of the mistake which happened in the previous amendment resulting in the name of PPSB being substituted for that of SPPP. In addition to this, it is settled law that the court may examine all the relevant documents in question in order to determine the admissibility of a particular document (see p 517B–F); *South Shropshire District Council v Amos* [1987] 1 All ER 340, *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257, *Re Sunshine*

Securities Pte Ltd [1978] 1 MLJ 57 and *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–94] All ER Rep 209 followed.

(3) In relation to the limitation period, by virtue of O 20 r 5(2) of the Rules of the High Court 1980 ('RHC 1980') the court may permit an amendment even after the relevant period of limitation current at the date of issue of the writ has expired (see p 518H–I).

(4) By virtue of O 20 r 5(3) of the RHC 1980, the court is empowered to allow the correction of the name of a party if the following conditions have been fulfilled: (i) there was a genuine mistake in naming the plaintiff or the defendant to the proceedings; (ii) the mistake was not misleading; (iii) the mistake was not such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued; and (iv) it is just to allow such an amendment (see p 519C–D).

(5) In the present case, the amendment should be allowed as (i) the principles laid down in the decided cases had been met; (ii) all the four conditions enumerated in O 20 r 5(3) had been fulfilled in the plaintiff's favour; and (iii) the justice of the case was with the plaintiff (see p 519H–520A).

[Bahasa Malaysia summary

Pada 31 Mac 1986, plaintif telah membawa satu tindakan terhadap Suruhanjaya Pelabuhan Pulau Pinang ('SPPP') yang dinamakan sebagai defendan pertama. SPPP kekal sebagai defendan pertama di dalam tindakan tersebut sehingga 26 September 1995 di mana, selepas permohonan plaintif, nama mereka telah digantikan dengan 'Penang Port Sdn Bhd (dahulunya dikenali sebagai Suruhanjaya Pelabuhan Pulau Pinang)' ('PPSB'). Menurut surat bertarikh 16 Mei 1995 yang mengandungi perkataan 'without prejudice' ('eks RA'), PPSB telah mengakui tanggungan mereka kepada plaintif. Seterusnya, plaintif telah memperolehi satu salinan Laporan Tahunan Suruhanjaya Pelabuhan Pulau Pinang 1994 dan telah mendapat tahu bahawa SPPP masih wujud dan bahawa ianya telah mengambil alih tugas tuanpunya pengawas dan bukannya tuanpunya pengendali. Plaintif telah memohon, antara lainnya, untuk satu perintah bahawa SPPP dinamakan kembali sebagai defendan pertama dalam pernyataan tuntutan. Peguambela SPPP membantah terhadap permohonan ini atas alasan bahawa: (a) tempoh had masa telah luput; dan (b) pindaan ini, jika dibenarkan, akan menambahkan satu pihak yang baru dan bukan semata-mata menukarkan suatu nama. PPSB membantah terhadap penggunaan eks RA untuk tujuan permohonan ini.

Diputuskan, membenarkan permohonan:

(1) Peraturan mengenai perlindungan yang terpakai kepada komunikasi berkaitan dengan rundingan penyelesaian bukanlah merupakan peraturan mutlak walaupun terdapatnya s 23 Akta Keterangan 1950 (lihat ms 516F).

International Bulk Shipping & Services Ltd v Minerals & Metals Trading Corp of India [1996] 1 All ER 1017
Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1992] 2 SLR 793
Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1993] 2 SLR 113
Norwich Union Life Insurance Society v Tony Waller Ltd (1984) 270 EG 42
Palaniappan v University Pertanian Malaysia [1995] 1 MLJ 353
Rush & Tompkins Ltd v Greater London Council & Anor [1989] AC 1280
South Shropshire District Council v Amos [1987] 1 All ER 340
Sunshine Securities (Pte) Ltd, Re [1978] 1 MLJ 57
Ted Bates (M) Sdn Bhd v Balbir Singh Jholl [1979] 2 MLJ 257
Weldon v Neal (1887) 19 QBD 394
Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor [1991] 3 MLJ 144
Yoong Leok Kee Corp Sdn Bhd v Chin Thong Thai [1981] 2 MLJ 21

Legislation referred to

Evidence Act 1950 s 23
Rules of the High Court 1980 O 20 r 5

Rumi Manecksha (*Rajiv Prabhakaran* with him) (*Praba & Associates*) for the plaintiff.
Abu Haniffa Abdullah (*Syarikat Abu Haniffa*) for the first defendant.
See Liang Teik (*Lim Huck Aik & Co*) for Suruhanjaya Pelabuhan Pulau Pinang.

Vincent Ng J: By an action dated 31 March 1986, the plaintiff sued Suruhanjaya Pelabuhan Pulau Pinang (the previous first defendant) ('the SPPP') and the Government of Malaysia ('the second defendant') for:

(1) A declaration:
  (a) that there was a breach of natural justice;
  (b) that the pension given at an early age was unfair;
  (c) that the decision of the first and second defendants was unfair and against the recommendation of the medical board;
  (d) that the plaintiff be reinstated to his former position as works study officer (pegawai kajian kerja);
(2) For all arrears of salary due to him;
(3) Damages;
(4) Interest; and
(5) Costs.

The plaintiff who was appointed to the department of the SPPP as a security officer on 29 December 1971, had applied vide summons in chambers dated 13 February 1996 (encl 33) supported by his affidavit affirmed on 1 February 1996 (encl 32) for the following orders:

(2) Di dalam kes ini, eks RA boleh diterimamasuk untuk tujuan permohonan ini kerana tidak terdapat keterangan bahawa ekshibit itu ditulis semasa rundingan serius ataupun ke arah mencapai penyelesaian. Ekshibit RA telah ditulis oleh PPSB dan bukannya oleh SPPP yang merupakan pihak yang ingin didakwa oleh plaintif. Lagipun bukti ekshibit tersebut adalah amat penting untuk membuktikan sebab fakta kesalahan yang telah berlaku dalam pindaan yang terdahulu yang berkesudahan dengan nama PPSB digantikan untuk nama SPPP. Tambahan pula, ianya merupakan undang-undang mantap bahawa mahkamah boleh meneliti semua dokumen yang relevan untuk mempastikan sama ada ianya boleh diterimamasuk (lihat ms 517B–F); *South Shropshire District Council v Amos* [1987] 1 All ER 340, *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257, *Re Sunshine Securities Pte Ltd* [1978] 1 MLJ 57 dan *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–94] All ER Rep 209 diikut.

(3) Berkenaan dengan pembatasan had masa, berdasarkan A 20 k 5(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT' 1980), mahkamah boleh membenarkan pindaan walaupun selepas tempoh had masa yang berkaitan yang terpakai pada tarikh pengisuan writ tersebut telah luput (lihat ms 518H–I).

(4) Berdasarkan A 20 k 5(3) KMT 1980, mahkamah berkuasa untuk membenarkan pembetulan nama sesuatu pihak jika syarat-syarat berikut telah dipenuhi: (i) terdapat kesalahan yang sebenar semasa menamakan plaintif atau defendan kepada prosiding; (ii) kesalahan tersebut tidak mengelirukan; (iii) kesalahan tersebut bukanlah sebegitu sehingga menyebabkan apa-apa keraguan yang munasabah tentang identiti pihak yang hendak mendakwa ataupun yang akan didakwa; dan (iv) adalah adil untuk membenarkan pindaan sebegitu (lihat ms 519C–D).

(5) Di dalam kes ini, pindaan tersebut patut dibenarkan kerana (i) prinsip-prinsip yang diputuskan dalam nas kes telah diikuti; (ii) keempat-empat syarat yang disenaraikan di dalam A 20 k 5(3) KMT 1980 telah dipenuhi dan menyebelahi pihak plaintif; dan (iii) keadilan kes tersebut juga menyebelahi pihak plaintif (lihat ms 519H–520A).]

Notes

For cases on 'without prejudice' negotiations, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1376 and 1626–1634.

For cases on amendments to pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 237–243.

Cases referred to

Daintrey, Re, ex p Holt [1893] 2 QB 116, [1891–94] All ER Rep 209
Lim Tjoen Kong v A-B Chew Investments Pte Ltd [1991] 3 MLJ 4
Government of Malaysia v Mohamed Amin bin Hassan [1986] 1 MLJ 224
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230

A (a) That the previous first defendant, Suruhanjaya Pelabuhan Pulau Pinang, be reinstated as the first defendant in the statement of claim;

(b) That the present first defendant, Penang Port Sdn Bhd be added as the third defendant in the writ and statement of claim;

(c) That the writ and statement of claim be amended as set forth in blue ink in the pleadings annexed; and

B (d) Costs.

When this action was first filed on 31 March 1986, the SPPP was named as the first defendant. The plaintiff in encl 32 stated that the SPPP was the first defendant in this suit, until 26 September 1995 when, upon the C plaintiff's application (encl 27), they were substituted by way of an amendment by consent of the parties ('the previous amendment') to read as 'Penang Port Sdn Bhd (formerly known as the Suruhanjaya Pelabuhan Pulau Pinang)' ('PPSB'). It is important to bear this historical fact in mind. Also, in para 3 of encl 32, he deposed that, following certain telephone conversations, PPSB admitted liability to the plaintiff on the D claim, which was confirmed by a letter dated 16 May 1995 marked as exh RA in encl 32 ('exh RA').

Subsequently, after conducting a search, the plaintiff was able to obtain a copy of the Suruhanjaya Pelabuhan Pulau Pinang Annual Report for 1994 and found that the SPPP was (and still is) in existence and had E assumed the role of owner regulator instead of that of owner operator.

In their affidavit in reply in encl 41, the first defendant stated that the SPPP and PPSB are two separate entities. The SPPP is a statutory body formed under the Penang Port Commission Act 1955 and has always been in existence notwithstanding the incorporation of PPSB which took effect F from 1 January 1994.

The plaintiff's counsel, Mr Rumi Manecksha, explained that exh RA had prompted the plaintiff to effect the previous amendment which substituted the name of the Suruhanjaya Pelabuhan Pulau Pinang with Penang Port Sdn Bhd. As exh RA featured prominently in this application, it is hereunder reproduced in full:

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All communications to be addressed to the secretary.

Suruhanjaya Pelabuhan Pulau Pinang Peti Pos 143 Pulau Pinang H Telephone 63571 Telegraphic Address 'WHARES, PENANG'	Penang Port Commission PO Box 143 Penang
Please quote following reference in replying to this letter:	AH 711/1 I 16 May 1995 Without prejudice

Inche Boss a/l Ramasamy,

@ Rizal Boss bin Abdullah,
No 18, Jalan 19,
Taman Bukit Merah,
43000 Kajang,
Selangor.

Dear Sirs,

Penang High Court Civil Suit No 21–30–86

We refer to your letter Ref D656/1 dated 15 April 1995.

Penang Port Sdn Bhd hereby confirms that in this case liability is on us.

As to your request for an out-of-court settlement, we will revert to you later.

Thank you.

Yours faithfully,
sgd (Ramlee bin Mohd Din)
for General Manager (Legal/Administrative)
Penang Port Sdn Bhd
RMD/rr

PPSB had objected to exh RA being used for the purposes of encl 33.

I allowed the introduction and admission of exh RA for the current application despite the rubric 'without prejudice' attached to it, upon the following considerations:

(1) The rule of privilege which applies to communications in the course of settlement negotiations is not absolute, despite s 23 of the Evidence Act 1950 (see *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4).

(2) Exhibit RA was written by PPSB and not the party that the plaintiff now intends, by the amendments, to sue (see *Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor* [1991] 3 MLJ 144, which followed the decision in *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4).

(3) It is vital to prove the exhibit, and indeed, as expressed by the plaintiff's counsel, the exhibit is intended solely for the purpose of proving the factual cause of the mistake which resulted in the previous amendment in the name of the first defendant.

(4) I am mindful that there are many authorities for the legal proposition that unless expressedly or impliedly waived, the privilege which (for reasons of public policy that out-of-court settlements should be encouraged) attaches to correspondence in the course of genuine settlement negotiations, continues to operate even after negotiations have been concluded and a settlement reached (see the decision of the House of Lords in *Rush & Tompkins Ltd v Greater London Council*

& Anor [1989] AC 1280). However, in my view, an open letter confirming settlement containing the terms thereof could constitute such an implied waiver by both parties, of the privilege, quite apart from the fact that such an open letter evinces the existence of an oral settlement agreement between the parties. However in the instant case, upon the principles enunciated in *South Shropshire District Council v Amos* [1987] 1 All ER 340 and *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–94] All ER Rep 209, I would hold that the exhibit should be admitted for the purposes of encl 33, as there were no particulars or anything else emanating from or evidenced by PPSB that this exhibit was written in the course of serious negotiations in or towards a settlement of a dispute. It is settled law that in order to determine the issue of admissibility of a document, the court may examine all the relevant documents in question (see *South Shropshire District Council v Amos*; *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257; and *Re Sunshine Securities Pte Ltd* [1978] 1 MLJ 57). The decision in *South Shropshire District Council v Amos* reaffirms the principle enunciated in *Re Daintrey, ex p Holt*, wherein in the course of giving judgment, Vaugham Williams J said at p 119:

> ... In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.
>
> The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer, the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms.

Indeed, it would appear that exh RA could be construed merely as an 'initiating letter' or 'an opening shot', following certain telephone conversations between the plaintiff and the representatives of PPSB, rather than a letter written in the course of negotiations wherein a *modus vivendi* between the parties had been proposed. In this regard, it would be useful herein to quote at some length the dicta of Harman J in *Norwich Union Life Insurance Society v Tony Waller Ltd* (1984) 270 EG 42 where his Lordship said:

> The rule is, as [counsel for the landlords] in my view absolutely correctly submitted, a rule of public policy based upon the proposition that it is better to settle than to fight. I paraphrase [counsel for the landlords], but I think that is not unfair as a way of putting what he was submitting. It is, in my judgment, an accurate description of the purpose of the rule, and it also, in my judgment, illumines the occasions on which the rule arises, and they are entirely in accordance with Vaughan Williams J's formulation. The rule has no application unless some other person is in dispute or negotiation with another. Here, the letter of 4 August 1982 was written, not quite out of the blue, because there had

been that rather inept inspection letter written eight months earlier, but written at a time when there was, so far as anything before me goes, no view, position, attitude or anything else emanating from or evidenced by the tenant. The matter at that stage was, in my view, entirely an opening shot, and an opening shot in a situation where no war had been declared and no dispute had arisen. Indeed 'shot' may be an inept word to apply to it. As it seems to me, this letter was not written in the course of negotiation, which must imply that each side has expressed a view and that a *modus vivendi* between them is being proposed, nor had a dispute been constituted, whether by litigation, arbitration or mere verbal or oral threats over the back fence of two neighbouring properties. It seems to me beyond any question that this rubric 'Without Prejudice' can only be effectively used where one has an extant disagreement – dispute, issue, call it what you will – or extant negotiations with both sides having set up their own position in them. As it seems to me, this letter, being the initiating letter, could not appropriately be so headed, and I therefore hold against [counsel for the landlords] first argument. In my view, it is not governed by the rubric attached to it 'Without prejudice', which words remain part of it and are material as part of its writing for the purpose of understanding what it really says but which do not have the effect of validly claiming privilege.

It was contended by plaintiff's counsel, Mr Rumi Manecksha, that the records would show that it was always the intention of the plaintiff to sue the SPPP. Counsel for the SPPP, Mr See Liang Teik, objected to this application on two grounds: firstly, that the limitation period had already set in; and secondly, that the amendment if allowed would amount to adding a new party and not merely just changing a name.

The plaintiff's application in encl 33 is made under O 20 r 5(3) of the Rules of the High Court 1980 ('the RHC 1980'). Order 20 r 5(3) states:

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

Order 20 r 5(2) of the RHC 1980 states:

(2) Where an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstance mentioned in that paragraph if it thinks it just to do so.

On a proper reading of O 20 r 5(2) (indeed, this rule was designed to put right the ratio in *Weldon v Neal* (1887) 19 QBD 394), it is crystal clear that this rule permits an amendment even after any relevant period of limitation current at the date of issue of the writ has expired. Rule 5 of O 20 is divided into five paragraphs: r 5(3) empowers the court to allow the correction of the name of a party; r 5(4) allows the alteration of the capacity in which the party sues or is sued; and r 5(5) allows the addition or substitution of a new cause of action. In relation to amendment under r 5(5), the requirement that the plaintiff has to satisfy the court that (a) the

facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him, is firmly established in a string of Malaysian and Singapore cases, namely: *Yoong Leok Kee Corp Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21; *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224; *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793 (this decision was affirmed in the Court of Appeal of Singapore in *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd* [1993] 2 SLR 113); *Palaniappan v University Pertanian Malaysia* [1995] 1 MLJ 353. See also *The Supreme Court Practice* (1979 Ed, Rep 1996 (Malaysian Ed), Vol 1) paras 20/5–8/7.

In an application under O 20 r 5(3), the court is enjoined to require the fulfilment of the following four conditions before allowing the amendment:

(1) there was a genuine mistake in naming the plaintiff or the defendant to the proceedings;

(2) the mistake was not misleading;

(3) the mistake was not such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued;

(4) it is just to allow such an amendment.

In the case of *International Bulk Shipping & Services Ltd v Minerals & Metals Trading Corp of India* [1996] 1 All ER 1017, the court agreed that the test in cases such as this is: 'Can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case, eg landlord, employer, owners or shipowners?' If the answer is in the affirmative, then an amendment can be allowed even where the correction involves substituting a different name altogether, and the name of a separate legal entity, which may be equivalent to substituting a new party.

In the current application, the plaintiff's counsel, Mr Rumi Manecksha, relied heavily on exh RA. There was thus a genuine error at the material time of the previous amendment, on the part of Mr Prabhakaran, earlier counsel for the plaintiff, who was under the impression that the name Suruhanjaya Pelabuhan Pulau Pinang had been changed to Penang Port Sdn Bhd. Furthermore, the fact that counsel (who is also present counsel) for the latter company had agreed to the previous amendment, amending the name of the first defendant in the original title of the action, may also have contributed to this genuine error.

From the pleadings, I cannot see any prejudice caused to any party, considering that the writ and statement of claim, from its commencement until the date of the previous amendment, contained indications beyond peradventure that the plaintiff was suing PPSB as the first defendant under the belief that it was 'formerly known as Suruhanjaya Pelabuhan Pulau Pinang'. This, by itself, would further indicate to the court that the mistake was not misleading and had no far-reaching effect. I find that the mistake was a genuine one caused by exh RA being sent by PPSB. In the circumstances, and as: (i) the principles laid down in the aforesaid decided

authorities have been met; (ii) all the four situations envisaged in O 20 r 5(3) of the RHC 1980 have been answered in the plaintiff's favour; and (iii) the justice of the case is with the plaintiff; it would therefore be just and fair to allow the amendment as prayed.

In the event, I allowed prayers (a) and (c) of encl 33. Prayer (b) has been abandoned. However, as counsel for PPSB had informed the court that they were in no position to object to the amendment, I made no order as to costs in respect of encl 33 against PPSB. The question however, as to who would have to pay the costs of the action to PPSB will be decided at the trial of the action under the amended title, and to this end, PPSB is entitled to appear at the trial and be heard.

As for the costs on encl 33 between the plaintiff and the SPPP, I ordered that costs be costs in the cause.

Application allowed.

Reported by T Vimalavathy